Board of County Commissioners
Agenda Request 45

Date of Meeting: July 13, 2004
Date Submitted: July 7, 2004

To: Honorable Chairman and Members of the Board
From: Herbert W.A. Thiele, Esq.
County Attorney
Subject: Review of Proposed Ordinance amending the Leon County Charter providing for campaign contribution limits, "clean elections" and non-partisan elections for Constitutional Officers.

Statement of Issue:
In accordance with the Board's direction, this agenda item provides the County's Attorney's Office review and comments relating to a proposed Ordinance amending the Leon County Charter providing for "campaign contribution limits," "clean elections" and "non-partisan elections" for Constitutional Officers. (See Attachment #1).

Background:
During the June 8, 2004 regular County Commission, a group of individuals calling themselves the Steering Committee to Amend the Leon County Charter submitted a proposed Ordinance to the Board for consideration. This "Steering Committee" specifically requested the Board to place the proposed ordinance on its July 13, 2004 agenda for adoption and subsequent presentation to the voters of Leon County on the November general election ballot. The proposed ordinance would substantially amend the Leon County Charter by limiting campaign contributions, creating a Clean Elections Board; defining eligible contributors to campaigns; requiring non-partisan elections for constitutional officers; and enforcement of penalties by code inspectors.

The County Attorney's Office has reviewed the proposed ordinance, pursuant to the Board's direction, and provides a comprehensive discussion about the relevant United States Supreme Court decisions relating to campaign contribution laws, possible state preemption as it relates to campaign financing laws, and comparison of other Florida counties' existing regulation of campaign contributions.

Analysis:

United States Supreme Court decisions relating to Campaign Contribution Laws

The third and fourth "Whereas" clauses, on page two (2) of the proposed ordinance, mention a United States Supreme Court opinion relating to campaign financing, but provide no citation or name of the case. Our extensive research revealed two (2) US Supreme court cases which cover the issue of limits on campaign contributions. A discussion of each case follows.

In 1976, the US Supreme Court considered its first case relating to campaign contribution laws. Although the Court found violations of the First Amendment in expenditure regulations, the Court, nevertheless upheld states' restrictions on contributions. *See Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, (1976) (per curiam)*. In the *Buckley* case, the Appellants consisted of various federal officeholders and candidates who brought suit against the appellees who

consisted of the Secretary of State, Clerk of the House, the Comptroller General, the Attorney General and the Federal Elections Commission seeking declaratory and injunctive relief against certain provisions of the Federal Election Campaign Act of 1971 which limited political contributions to candidates for federal office by an individual to $1,000 and by a political committee to $5,000.

The *Buckley* case held that the Federal Election Campaign Act provision placing a $1,000 annual ceiling on independent expenditures linked to specific candidates for federal office infringed upon speech and association guarantees of the First Amendment and the Equal Protection Clause of the Fourteenth, but upheld other provisions limiting contributions by individuals to any single candidate to $1,000 per election. Therefore, under *Buckley's* standard of scrutiny, a contribution limit involving significant interference with associational rights could survive only if the Government demonstrated that regulating contributions was a means "closely drawn" to match a "sufficiently important interest."

Almost thirty (30) years later, the US Supreme Court applied the doctrines held in *Buckley* at the state level in the State of Missouri. In the case of *Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 120 S.Ct. 897 (2000)*, the U.S. Supreme Court found adequate support for the Missouri law in the proposition that large contributions raise suspicions of influence peddling tending to undermine citizens' confidence in government integrity. It further held that *Buckley* is authority for comparable state limits on contributions to state political candidates, and those limits need not be pegged to the precise dollar amounts approved in Buckley.

In 1994, the Missouri Legislature enacted Senate Bill 650 to restrict the permissible amounts of contributions to candidates for state office. Before the statute became effective, Missouri voters approved a ballot initiative with even stricter contribution limits. The Eighth Circuit US Court of Appeals held the ballot initiative contribution limits unconstitutional under the First Amendment to the United States Constitution. Depending on a specified state office the Missouri statute was amended three (3) years later in 1997 imposing contribution limits ranging from $250 to $1,000. The named state offices include the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general.

The Respondents in the case were Shrink Missouri Government PAC, a political action committee and Zev David Fredman, a Republican candidate for state auditor. Fredman and Shrink Missouri Govt. requested an injunction to stop the state's enforcement of the contribution statute as violating their First Amendment right to free speech and association and their Fourteenth Amendment right to equal protection. Shrink Missouri claimed that they contributed $1,025.00 to Fredman's campaign in 1997 and another $50.00 in 1998. At that point, they reached the $1,075.00 state contribution limit, but intended to contribute additional monies to Fredman's campaign. Fredman claimed he could campaign more effectively only with higher contribution limits.

Applying *Buckley v. Valeo*, the District Court upheld the Missouri statute and found adequate support for the threshold limit because large contributions raise suspicions of influence peddling tending to undermine citizens' confidence in the integrity of the government. On appeal to the Eight Circuit Court of Appeals, that court reversed the District Court and enjoined the state's enforcement of the law. The Eight Circuit also applied *Buckley* for other reasons stating that it articulated and applied a strict scrutiny standard of review. The Eight Circuit forced Missouri to demonstrate that it had a compelling interest and that the contribution limits at issue were narrowly drawn to serve that interest. Missouri's claim of corruption, by itself, was insufficient for the Eighth Circuit and therefore, required demonstrable evidence indicating genuine problems that resulted from contributions in amounts greater than the limits in place.

The US Supreme Court reversed the opinion of the Eighth Circuit stating

> The prevention of corruption and the appearance of corruption was found to be constitutionally sufficient justification…To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is

> undermined...Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions...(*Nixon* at p.388).

As far as the demonstration by Missouri of empirical evidence of corruption, the Supreme Court considered the affidavit of Senator Wayne Goode, co-chair of the state Interim Joint Committee on Campaign Finance Reform, who stated that large contributions have the "real potential to buy votes." The Court also considered newspaper accounts of large contributions supporting inferences of impropriety. One report questioned the state treasurer's decision to use a certain bank for most of Missouri's banking business after that institution contributed $20,000 to the treasurer's campaign. The Supreme Court also made mention that 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.

Both cases (*Buckley* and *Nixon*) equally protect First Amendment concerns and the integrity of the electoral process by building public confidence in that process and, encouraging the participation of the public and open discussion protected by the First Amendment right to free speech and association. While the US Supreme Court has upheld **federal** and **state** laws regulating campaign contribution limits, we have serious concerns that a local ordinance county charter seeking to regulate campaign contributions at the local level may be preempted if the state is already enforcing regulation in the same area. Thus, a discussion of state regulation of campaign contributions is also necessary.

State regulation preempts local regulation of campaign contributions.

On page 9-10 of the proposed ordinance, the writer seeks to add new charter language to Section 2.2 of the Leon County Charter by creating a new subsection (7) regulating Campaign Finance and contribution limits. Specifically, the new subsection (7)(C)(1) states "Candidates shall not accept campaign contributions made in an amount exceeding $200.00 per election." This language is problematic in that the Florida Legislature has already enacted language regulating the dollar limits of campaign contributions. Section 106.08(1)(a), provides that:

> Except for political parties, no person, political committee, or committee of continuous existence may, **in any election**, make contributions in excess of $500 to any candidate for election to or retention in office or to any political committee supporting or opposing one or more candidates. (Emphasis added).

Section 106.011(6) defines "Election" to mean

> ...any primary election, special primary election, general election, special election, or municipal election held in this state for the purpose of nominating or electing candidates to public office, choosing delegates to the national nominating conventions of political parties, **or submitting an issue to the electors for their approval or rejection**. (Emphasis added).

Florida law does not distinguish the $500 contribution limit by specific office. Instead, without ambiguity, the $500 limit applies equally and broadly to all elections held in Florida. The only exceptions are the candidate's own personal contributions, and any contributions from a state or county executive committee of a political party regulated by Chapter 103, *Florida Statutes*. Therefore, we believe that the state legislature specifically preempted the field of campaign contributions regulation, and the proposed ordinance is trumped by Section 106.08(1)(a), *Florida Statutes*. See generally *Attorney General Opinion #074-263*. (Municipal regulation of campaign financing is preempted by state regulation). On the other hand, one may argue that requiring a more restrictive limit, a $200 limit, at the local level does not violate the state limit of $500. It would apply solely to local governmental officers. Therefore, can the $200 limit co-exist with the $500 limit? Perhaps, if you are a candidate in Sarasota County. We discuss more of this later in the Sarasota County section of this agenda item.

Clean Elections

The proposed ordinance provides for the creation of a new subsection (8) under Section 2.2 of the Leon County Charter. Subsection (8) seeks to provide for voluntary candidate spending limits to commensurate with "Clean Money" campaign financing by creating a new Leon County "Clean Elections Board". The new language also provides for the creation of a "Clean Elections Trust Fund" to be administered independently by a non-partisan Clean Elections Board. Overall, it appears that the language seeks to limit candidate campaign spending limits, but the program is voluntary. In addition, the language attempts to borrow language from a federal Bill which was recently introduced in Congress (See Attachment 2). The 108th Congress attempted to substantially reform the financing of Federal elections by presenting H.R. 3641 on the Floor sometime in November 2003. However, as of December 2003, the Bill was referred to the House Subcommittee with no further action. The goal as stated in subsection (8) (1) of the proposed ordinance involves the following policy considerations:

> Leon County as the provider for voluntary candidate spending limits and commensurate Clean Money campaign financing to protect democratic elections for non-partisan offices as defined in this Home Rule Charter, to allow all qualified candidates to compete effectively and to insure the integrity of public elections. In order to encourage citizen confidence and participation in the political process, to minimize the influence of special-interest money, to promote freedom of speech in facilitating communications by candidates with the electorate, and to free candidates from the rigors of excessive political fundraising.

Furthermore, the new language covers a broad spectrum of financial issues, including but not limited to such items as

- Establishment of a Leon County Clean Elections Board from among volunteer Leon County citizens who determine: eligibility requirements, allocation of clean money funds, and reasonable spending limits.
- Non-partisan who volunteer to participate must file a declaration of compliance to include: required number of signatures and $5 contributions, collection of only Seed money contributions and spends less than the required spending limits.
- Establishment of a Clean Elections Trust Fund to allocate funds to participating candidates, supplemental funds from the Board
- All participating Candidates receive equal funds with each election races.
- Non-participating candidates are required to disclose excess spending over his/her Clean Money candidate.
- In-kind contributions.

The goals and intentions of the above-mentioned new language attempt to set a parameter for participants and non-participants in the "Clean Money" program. However, we believe it seeks to accomplish the same campaign financing measures already set forth in Chapter 106, *Florida Statutes,* the state Campaign Financing laws. Therefore, the new language is, at best, redundant and most likely preempted as well. Florida law provides for the enforcement, prosecution and the violation of campaign financing laws among three (3) different regulatory bodies: Division of Elections, Florida Elections Commission and Florida Commission on Ethics.

Division of Elections. In pertinent part, the Division of Elections is charged with the following responsibilities:

> (2) Prepare and publish manuals or brochures setting forth recommended uniform methods of bookkeeping and reporting,...
>
> (6) Make, from time to time, audits and field investigations with respect to reports and statements filed under the provisions of this chapter and with respect to alleged failures to file any report or statement

required under the provisions of this chapter. This division shall conduct a post election audit of the campaign accounts of all candidates receiving contributions from the Election Campaign Financing Trust Fund.

(7) Report to the Florida Elections Commission any failure to file a report or information required by this chapter or any apparent violation of this chapter. [See Section 106.22. F.S.]

Florida Elections Commission. In accordance with section 106.25, *Florida Statutes*, the FEC is charged with "investigating all violations of this chapter and chapter 104, after receiving a sworn complaint." In addition, "other officers or agencies of government empowered by law are permitted to investigate, act upon, or dispose of alleged violations of this code."

Florida Commission on Ethics. For the same reasons discussed above relating to campaign contributions limit, the Florida Legislature has already enacted state law regulating the field of Ethics held by Public Officers. Section 112.320, *Florida Statutes*, provides the purpose of the Florida Commission on Ethics is "...to serve as guardian of the standards of conduct for the officers and employees of the state, and of a **county**, city, or other **political subdivision of the state**, ..." (Emphasis added).

Section 112.313, Florida Statutes provides a "catch-all" list of standards of conduct for public officers. The term "public officer" includes any person elected or appointed to hold office in any agency. (See Section 112.313(1). "Agency" means any state, regional, **county**, local, or municipal government entity of this state... See Section 112.312 (2), Florida Statutes. The Standards of Conduct as listed in Chapter 112 include complete and full disclosure by the public officer of the following caveats:

- Solicitation or Acceptance of Gifts.
- Doing Business with one's Agency.
- Unauthorized Compensation.
- Salary and Expenses.
- Misuse of Public Office.
- Conflicting Employment or Contractual Relationship
- Disclosure or Use of Certain Information.
- Postemployment Restrictions.
- Employees Holding Office.
- Professional and Occupational Licensing Board Members.

It appears that the above list covers every conceivable scenario relating to possible ethics violations by public officers including the proposed charter language requirements for "Clean Elections." Therefore, it is our recommendation that we defer to the named Florida Commissions as the proper regulatory body to investigate misuse of funds, office, salaries, contributions and other ethical violations or related issues covered by the proposed charter amendment clean money language.

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Enforcement & Penalties
Section 8, page 7 of the proposed ordinance, provides for the county code inspectors to investigate and enforce the provisions of the proposed ordinance for alleged violations. Although, code enforcement inspectors are statutorily authorized to enforce compliance with the county code under Chapter 125 and 162, *Florida Statutes*, again, we believe this is limited to technical codes, not elections matters, and thus we recommend deference to the Florida state agencies for campaign finance violations as it relates to public officers.

Non-partisan Offices
Section 3.2, page 16 of the proposed ordinance seeks to amend the Leon County Charter by making the Clerk of Court, Sheriff, Property Appraiser and Tax Collector non-partisan offices. As directed by the Board, county staff submitted the proposed ordinance to the aforementioned Leon County officers along with a cover memo requesting their feedback and reaction to the suggested language. (See Attachment #3).

Other Local Government Regulations of Campaign Contributions
Although the proposed ordinance presents novel issues to Leon County, it is not a new concept to two other Florida counties. Alachua County and Sarasota County are implementing or already enacted local laws regulating campaign-financing contributions. Although we mentioned earlier in our analysis that Chapter 106, Florida Statutes, preempts local regulation of campaign contributions, the local governments in Alachua and Sarasota Counties have distinguished themselves with authority provided by special laws and a circuit court decision.

Alachua County. In 2002, the Alachua County Legislative Delegation enacted HB 1073, a special law amending the Alachua County Charter. In particular, the special law provides to Alachua County the authority to adopt an ordinance amending its Charter to require more stringent restrictions than those imposed by general law relating to campaign financing. Eventually, the Alachua County Commission adopted Ordinance #04-01, and the ballot question will be placed to the voters of Alachua County in the November 2004 elections. (See Attachment #4). As set forth in Section 1.6 of the Alachua County Charter such stringent restrictions include, solicitations, contributions, expenditures, record keeping, reporting requirements, and noncriminal penalties for violations. Since the Legislature enacted a special law authorizing Alachua County to regulate campaign contributions, it is arguably not preempted by Chapter 106, Florida Statutes.

Sarasota County. The County Commission in Sarasota County was "authorized" to enact its local regulation of campaign contributions by the judicial branch. Sometime in November 1990, the electors of Sarasota County approved an amendment to the Sarasota County Charter which regulated campaign financing by limiting contribution limits to $200.00. (See Attachment #5). Consequently, a local Sarasota resident filed a lawsuit in the Twelfth Judicial Circuit claiming that the ordinance was unconstitutional because it impinged First Amendment protection of speech. In September, 1999, the Honorable Judge Bob McDonald entered a Final Summary Judgment order in favor of Sarasota County holding that:

> Chapter 106, Florida Statutes, does not impliedly preempt local governments from legislating in the arena of campaign contribution limitations. The state regulatory scheme is not so pervasive that the County has no room to act...State and local provisions can co-exist as long as the local regulation does not require an individual to take any action which would violate the state law or forbid the individual from taking action which the state law requires....it is not a conflict if the ordinance is more stringent than the statute... compliance with the local regulation does not require violation of the state law or forbid one from taking any action which the state law requires. The local regulation and state statute can co-exist.

A year later, Sarasota County amended its county charter to conform to the circuit's court's ruling, and subsequently adopted section 6.5A of the charter which reads as:

> No candidate for any county office for which compensation is paid shall accept any contribution from any

contributor, including any political committee as defined by state law, in cash or in kind, in an amount in excess of $200.

Section 6.6 of the Sarasota Charter provides for enforcement of the ordinance and section 46-36 provides for penalties. (See Attachment #6).

Although reference to the Sarasota County Charter as a model ordinance for regulating campaign contribution limits in Leon County has been suggested, the circuit court ruling is not authoritative law in our area, the Second Judicial Circuit. Further, we have serious concerns with regard to that Court's analysis and conclusion. To date, there have been no other court rulings around the state of Florida on this area of law.

Options:

1. Accept the report and recommendations of the County Attorney.
2. Do not accept the report and recommendations of the County Attorney.
3. Other Board direction.

Recommendation:

Option #1.

Attachments

1. Proposed Ordinance

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